THE UNIVERSITY of ADELAIDE

Public Law & Policy Research Unit

14 November 2016

Submission on the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016

This submission was written by Associate Professor Alex Reilly, Deputy Dean Adelaide Law School, and endorsed by members of the Public Law and Policy Research Unit.

1. The rationale for the Bill is flawed

In his Second Reading speech, the Minister for Immigration and Border Protection stated the purpose of the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 "is to reinforce the government's longstanding policy that people who travel here illegally by boat will never be settled in this country".

In our submission, this is an unsatisfactory rationale for introducing the legislation. The government's policy on the opportunity to settle in Australia for asylum seekers arriving by boat is abundantly clear. The government has made it clear through the implementation of its policy of boat interceptions and offshore detention and processing. It has advertised this policy extensively in neighboring countries, and through a concerted campaign in Australian and international media.

There can be no doubt that the government's policy has been understood. As the Minister states, there has been no successful asylum seeker boat arrival for over 830 days.

There is no evidence that this extra detriment will act as a further deterrent. The measure is unprecedented in refugee policy around the world, so it is not possible to draw a comparison with the success of the measure in other jurisdictions. From a purely common sense point of view, the primary deterrent of asylum seekers is that they will not

be resettled in Australia permanently or on a temporary basis as a refugee. Whether they will be able to visit Australia in some other capacity as a permanent resident or citizen of another country later in their lives will be a secondary concern.

2. The Bill imposes an unjustifiable and unnecessary penalty on innocent people

The effect of this Bill is to impose a penalty for life, on an extremely vulnerable group of refugees, simply for seeking protection in Australia. The greatest impact of this Bill will be on those people on Nauru and Manus Island who have been separated from family in Australia.

Although it is possible for people in this position to apply to the Minister to lift the ban, this is likely not to be a simple process. Any delay in time, extra expense, or complication in the application process will deter people from visiting Australia even when it is in the best interests of Australian citizens and permanent residents that they be able to visit.

It is worth remembering that people in this cohort will experience trauma in visiting Australia given their treatment when they last tried to enter Australia. Being singled out for a special visa application process which involves individual consideration by the Minister for Immigration may well be enough to deter them making an application in the first place.

3. The Bill is in breach of the Refugee Convention

The Bill clearly contravenes Article 31(1) of the Refugee Convention. Whereas the Government has mounted an arguable case for why off-shore processing does not breach the Convention, there can be no doubt that imposing a life time visa ban on asylum seekers is in breach of Article 31(1). For a full explanation of the breach, see Professors Jane McAdam and Ben Saul: http://www.smh.com.au/comment/malcolm-turnbull-is-breaking-international-law-with-cruel-lifetime-refugee-ban-20161108-gskstx.html or Professor Michelle Foster: https://theconversation.com/turnbulls-asylum-seeker-ban-violates-australias-human-rights-obligations-68475

4. The Bill is contrary to principles of Streamlined Visas that the Department of Immigration and Border Protection is applying in other contexts.

The Future Directions in Streamlined Visas Report of June 2015 pointed to multiple benefits of Streamlined Visas including enhancing the competitiveness of our visa system and supporting the integrity of Australia's visa programmes and border. As a result, the DIBP introduced a new streamlined visa process for International Students.

The Bill directly contradicts these principles. It adds administrative complexity to the visa system, and undermines the integrity of our visa programs by introducing new, complex, discretionary criteria on all visas issued by the department, since the visa ban applies to every type of visa.

The arbitrariness of the visa ban will affect our reputation as a country open to visitors. There is a danger that refugees not in the cohort, and perhaps a much wider group of potential visitors on business or travel, will also wrongly believe they are banned, and choose not to visit Australia.

5. The Bill imposes a costly and inefficient administrative burden on the Minister

Australia rightly screens visitors to our country for security and health reasons. The Minister has a discretion to reject visa applications for people whose visit is considered not to be in the national interest. The Bill reverses the onus, meaning the refugees covered by the Bill are subject to a visa bar that prevents them from ever making a valid visa application, without the permission of the Minister for Immigration.

This places a costly and inefficient administrative burden on the Minister to consider individual applications from refugees in the cohort to have the visa ban lifted. The Minister will have this administrative burden until the last refugee in the cohort dies which may be 60 or 70 years hence.

It is unclear what criteria the Minister should apply to lift the ban. If the Minister applies the existing public interest criteria around health and security, then applicants will inevitably be eligible to apply, and there is no apparent purpose for the visa. If the Minister applies more stringent criteria, this leads to unjustifiable discriminatory treatment.

6. Conclusion

There is nothing to recommend this Bill. It breaches international law and is unprecedented in international practice. It has no rational policy justification, lacks an evidence base, is inefficient and costly, and is an unnecessary burden on a vulnerable cohort of refugees,

We urge the Senate to reject the Bill.